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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1007

BENJAMIN COHEN,

Petitioner,

vs.

CENTRAL NATIONAL BANK OF JACKSONVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

WHEN A FLORIDA STATUTE REQUIRES TEN DAYS' NOTICE TO BE GIVEN BEFORE SECURITIES, WHICH ARE HELD AS COLLATERAL, ARE SOLD BY A BANK, DO THE FLORIDA RULES OF CIVIL PROCEDURE APPLY TO REQUIRE AN ADDITIONAL THREE DAYS' NOTICE WHEN NOTICE IS SENT BY REGISTERED MAIL, TO INSURE DUE PROCESS AND EQUAL PROTECTION UNDER THE LAWS?

STATEMENT OF THE CASE

The Respondent accepts Petitioner's statement of the case.

REASONS FOR NOT GRANTING THE WRIT

A. Petition Not Timely Filed

The Petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should not be granted since it was not timely filed.

The judgment of the United States Court of Appeals for the Fifth Circuit in this case was entered on August 13, 1970. Supreme Court of the United States Rule 22.3 provides that:

> "A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law."

Title 28 U. S. C. A. Section 2101 (c) provides that:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety (90) days after the entry of such judgment of decree. A justice of the Supreme Court, for good cause shown, may expend the time for applying for a writ of certiorari for a period not exceeding sixty (60) days."

In order for Petitioner's petition for writ of certiorari to have been timely filed, without extension, it would have to have been filed on November 11, 1970, in accord with Supreme Court of the United States Rule 34.1. Instead it was filed on November 24, 1970.

On November 10, 1970, the Petitioner filed an "Application for Extension of Time in Which to File Petition for Writ of Certiorari." A copy of this application appears in Appendix A. This application was made one day prior to the deadline for filing the Petition for Writ of Certiorari in this case.

On November 16, 1970, Mr. Justice Black entered an order granting until and including November 25, 1970 for filing petition for a writ of certiorari, without prejudice to

the Court's consideration as to whether the application was filed in time. Mr. Justice Black's order was granted pursuant to Supreme Court of the United States Rule 34.2 which provides in part that:

> "Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period."

The Respondent submits that the Petitioner's application for extension of time in which to file his petition for writ of certiorari was made during the last ten days of the period sought to be extended. Indeed, it was made on the very last day prior to the expiration of the period.

Respondent further submits that the Petitioner has not shown the extraordinary circumstances which would justify the extension of time in which to file the petition for writ of certiorari in this action pursuant to Supreme Court of the United States Rule 34.2.

B. Argument

Rule 1.6(e), of the 1954 Florida Rules of Civil Procedure did not extend the ten days' notice of sale prescribed in Section 685.02, Florida Statutes, 1965, as contended by Petitioner, because the 1954 Florida Rules of Civil Procedure are applicable only to lawsuits of a civil nature and all special statutory proceedings in the Circuit Courts, County Judge's Courts, County Courts and Civil Courts of Record. Whereas, section 685.02 applied to the non-judicial sale of collateral securities.

Rule A of the 1954 Florida Rules of Civil Procedure is set forth below:

> "Scope and Title of Rules. These rules are applicable to all suits of a civil nature and all special statutory